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IN THE
# Supreme Court of the United States

ELWOOD STROUT, DEBORAH STROUT,
JOHN EULITT, BELINDA EULITT,
RICHARD ROY, and PATRICIA ROY,
*Petitioners,*

v.

J. DUKE ALBANESE, in his official capacity
as Commissioner, Maine Department of Education,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF TIMOTHY HUMPHREY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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## BRIEF OF TIMOTHY HUMPHREY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

*Amici curiae* Timothy Humphrey, *et al.*, submit this *Amici Curiae* Brief in Opposition to the Petition for a Writ of Certiorari.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and that the National Education Association made a monetary contribution to the preparation and submission of this brief. This Brief is submitted with the written consent of the parties pursuant to Supreme Court Rule 37.

## INTEREST OF THE *AMICI CURIAE*

Timothy Humphrey, Jane Humphrey, Frank McDermott, Timothy Morin, Joan Morin, Timothy Fitzgerald, Ken Williams, and Barbara Williams are defendants-intervenors in *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), which is now pending before this Court on a Petition for Writ of Certiorari to the Supreme Judicial Court of Maine (Case No. 99-163). Because the instant case and *Bagley* present precisely the same constitutional question, *amici curiae* Timothy Humphrey, *et al.*, have an interest in the disposition of this case.

## COUNTERSTATEMENT OF THE CASE

The State of Maine requires all public school districts to provide a free kindergarten through twelfth grade education to their residents. 20-A M.R.S.A. § 100(8). School districts may fulfill this statutory obligation by operating their own public schools, or by using public funds to pay the tuition for resident families to send their children to public or approved private schools pursuant to the State's education tuition program ("voucher program").

Sectarian private schools are ineligible to participate in the Maine voucher program: the governing statute provides that "[a] private secondary school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2). This case involves a constitutional challenge to the voucher program—specifically, to the program's exclusion of sectarian private schools.

Petitioners are the parents of children residing in the Minot school district—*i.e.*, School District 29. School

District 29 does not operate a public high school, but instead provides secondary education through the voucher program. Petitioners asked School District 29 to pay the tuition for their children to attend St. Dominic Regional High School—a pervasively sectarian private school. When the school district refused—citing the voucher program's specific exclusion of sectarian private schools—petitioners brought suit in the United States District Court for the District of Maine, claiming a violation of their rights under (1) the Establishment Clause of the First Amendment, (2) the Free Exercise Clause of the First Amendment, (3) the Free Speech Clause of the First Amendment, (4) the Due Process Clause of the Fourteenth Amendment, and (5) the Equal Protection Clause of the Fourteenth Amendment. The district court rejected all of petitioners' claims, and the First Circuit affirmed.

The First Circuit gave short shrift to petitioners' specific claims, devoting its attention primarily to the question of whether the Establishment Clause prohibits the use of public funds to pay tuition at a sectarian private school. The court below answered this question "yes," noting that this Court "has never permitted broad sponsorship of religious schools." *Strout v. Albanese*, 178 F.3d 57, 62 (1st Cir. 1999).

Judge Campbell filed a separate concurring opinion. Although agreeing with the other panel members that there was no merit to any of petitioners' claims, Judge Campbell departed from the majority in terms of analysis, opining that the majority had gone "further than necessary." *Id.* at 67. "The question," according to Judge Campbell, "is whether the current statute is unconstitutional, not whether a more inclusive one would be," *id.*, and he therefore saw "no need for [the court below] to decide that a broader statute (*i.e.*, one also subsidizing

attendance at sectarian private schools) would violate the Establishment Clause of the First Amendment . . . ." *Id.* at 66.

## REASONS FOR DENYING THE WRIT

### THE INSTANT CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE ESTABLISHMENT CLAUSE QUESTION RAISED BY VOUCHER PROGRAMS THAT INCLUDE SECTARIAN PRIVATE SCHOOLS

A. In the Questions Presented section of their Petition for a Writ of Certiorari ("Pet."), petitioners set forth five separate questions, reasserting each of the constitutional claims rejected by the court below. But there is a major disconnect between these questions and the remainder of the Petition.

Although petitioners devote 13 pages of their Petition to a discussion of the "REASONS FOR GRANTING THE WRIT"—*i.e.*, pages 6-19—there is not a single reference to petitioners' claims under the Free Speech Clause (Questions Presented No. 2 and 5), the Equal Protection Clause (Question Presented No. 3), the Free Exercise Clause (Question Presented No. 4), or the Due Process Clause (Question Presented No. 5).[2] The Petition does to be sure make repeated reference to the Establishment Clause, but not to the Establishment Clause claim that actually was made by petitioners in the court below. That claim—*i.e.*, that the "negative prohibition" of the Establishment Clause provides petitioners with an affirmative "basis for extending the right of a religiously affiliated group to secure state subsidies," 178 F.3d at

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[2] Although the Due Process Clause is not expressly mentioned in Question Presented No. 5, the context indicates that the reference to the Fourteenth Amendment is intended to implicate that Clause.

64—was summarily rejected by the First Circuit, *id.*, and is not pursued here.

The Petition deals with only one question. This question—which, according to petitioners, is "[t]he central issue in this case [and] is one of great importance," Pet. at 6—is "whether the Establishment Clause of the First Amendment *requires* discrimination against the religious point of view in the provision of tuition assistance to parents of children attending private schools." *Id.* (emphasis in original).[3] *Cf.* Question Presented No. 1:

> Whether the Establishment Clause of the First Amendment requires the discriminatory exclusion of an otherwise eligible private school from a state tuitioning program just because that school is religious?

B. Viewed in these terms, the Petition in this case is on all fours with the Petition for Certiorari that is now pending before this Court in *Bagley, et al. v. Raymond School Department, et al.*, No. 99-163. *Bagley* involves a contemporaneous and virtually-identical challenge to Maine's voucher program in the state court system. *See* 178 F.3d at 64 ("We are fortified in our conclusion by the Maine Supreme Court's recent opinion in *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), *dealing with a similar situation.*") (emphasis added).[4]

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[3] After attempting to develop this question on page 6 of the Petition, petitioners conclude the page by stating that "[t]he Petition also presents an important and substantial issues [sic] which necessitate review. This Court's [sic] should grant review." We are reluctant to speculate as to intent of this rather obtuse statement, but petitioners may be referring to their other constitutional claims.

[4] The one notable difference is that *Bagley* did not involve claims under the Due Process Clause of the Fourteenth Amendment or the Free Speech Clause of the First Amendment.

Because the Maine Supreme Court saw the case in precisely the same terms as did the First Circuit, and ruled accordingly, the Question Presented in the *Bagley* Petition is substantively the same as "[t]he central issue in this case." Pet. at 6. The *Bagley* petitioners have formulated their Question as follows:

> Does the Establishment Clause of the U.S. Constitution require the exclusion of religious schools from Maine's tuitioning program, which allows parents to choose from an array of public and private schools for their children's education?

*Amici* are intervening defendants in *Bagley*, and on August 30, 1999 they filed a Brief in Opposition to the Petition for Certiorari in that case (Brief in Opposition of Respondents Timothy Humphrey, *et al.* and Maine Civil Liberties Union; hereinafter "*Bagley Opp.*"). In that Opposition, *amici* agreed with petitioners that there is a need for further guidance from this Court on the important question of whether and under what circumstances public funds can be used to pay for pupils to attend sectarian private schools, but they argued that the *Bagley* case is not an appropriate vehicle for providing such guidance. *Amici* made two points in support of that argument.

1. The first point is that the *Bagley* case does *not* involve a program pursuant to which public funds are used to pay for sectarian private school education—as a result of which the Establishment Clause question is presented in a hypothetical context without the type of factual record that is essential to proper constitutional analysis. That point, of course, applies with equal force here. *See* 178 F.3d at 67 (Campbell, J., concurring) ("The question is whether the current statute is unconstitutional, not whether a more inclusive one would be.").

Accordingly, *amici* respectfully refer this Court to pages 7-11 of the *Bagley* Opposition.

2. The second point that *amici* made in the *Bagley* Opposition was that the finding of the Maine Supreme Court that the inclusion of sectarian private schools in the voucher program would violate the Establishment Clause was not necessary to the disposition of petitioners' claims. With one qualification, that point likewise is applicable here.

The Establishment Clause analysis of the Maine Supreme Court was undertaken in the course of the Court's consideration of petitioners' Equal Protection Clause claim. But the court found at the outset of that consideration that petitioners lacked standing to make such a claim, and that finding provided an independent basis for sustaining its judgment. The First Circuit—at least in terms—made no such finding here.

The other reason why the Maine Supreme Court's conclusion as to the prohibitory effect of the Establishment Clause was unnecessary was because petitioners' Equal Protection Clause claim should have been rejected on the basis of this Court's summary affirmances of the three-judge district court decisions in *Brusca v. Missouri*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), and *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). *Cf.* 178 F.3d at 68 (Campbell, J., concurring) ("I see no need whatever to reach out and decide the thorny establishment clause issue . . . ."). This latter reason is also applicable here, and, accordingly, *amici* respectfully refer this Court to pages 13-18 in the *Bagley* Opposition.

## CONCLUSION

The reasons for granting the Petition that are advanced by petitioners in this case are the same reasons that have been advanced by petitioners in *Bagley, et al. v. Raymond School Department, et al.*, Case No. 99-163. In *amici's* Brief in Opposition in *Bagley*, we explain why those reasons are insufficient, and urge this Court to address the important Establishment Clause question presented by voucher programs that include sectarian private schools not in the hypothetical and muddled context of the Maine voucher program, but rather in a case that presents that question in direct and pristine form. For the same reasons, the Petition for Writ of Certiorari should be denied in this case.

Respectfully submitted,

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